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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68

JOINT COMMENTS
IN SUPPORT OF CORE COMMUNICATIONS, INC.'S
PETITION FOR STAY PENDING JUDICIAL REVIEW

The Competitive Telecommunications Association, e.spire Communications, Inc., KMC Telecom Holdings, Inc., Intermedia Communications Inc., Net2000 Communications Services, Inc., North County Communications, Inc., SNiP Link LLC, and Wireless World, LLC (collectively, "the Joint Commenters"), through counsel, hereby submit their comments in support of Core Communications Inc.'s ("CoreTel") June 1, 2001 petition for stay pending judicial review[1] of the "growth cap" and "new market bar" of the Commission's *Order on Remand* in the above-captioned proceedings.[2]

I. INTRODUCTION AND SUMMARY

The Joint Commenters include a number of competitive local exchange carriers ("CLECs") that have been actively engaged in the reciprocal compensation debate over the last

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[1] Request of Core Communications, Inc. for Stay Pending Judicial Review (filed June 1, 2001) ("CoreTel Petition").

[2] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket 99-68, Order on Remand (rel. Apr. 27, 2001) ("*Order on Remand*"). The *Order on Remand* is published at 66 Fed Reg., 26,800 (2001) and, barring further action, will become effective on June 14, 2001.

several years before this Commission, myriad state public service commissions, and myriad state and federal courts. The Joint Commenters believe that the Commission's *Order on Remand* (1) violates the Communications Act of 1934, as amended,[3] (2) violates the Administrative Procedure Act,[4] and (3) fails to address adequately the Court of Appeals for the District of Columbia Circuit's remand order in *Bell Atl. Tel Cos. v. FCC*.[5] Accordingly, several of the Joint Commenters have filed Petitions for Review of the *Order on Remand*.[6]

The Joint Commenters anticipate experiencing similar irreparable harm to that outlined in the CoreTel Petition as a result of the growth cap and new market bar. As such, the Joint Commenters submit that the Commission should grant the CoreTel Petition in its entirety. In the alternative, the Commission could mitigate the irreparable harm that CLECs would encounter under the growth cap and new market bar by issuing a *sua sponte* order either (1) delaying implementation of these rules by one year or (2) conforming these rules in accordance with the ALTS/CompTel March 26, 2001 *ex parte* letter.[7]

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3 47 U.S.C. § 151 *et seq*.

4 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5372, 7521.

5 *Bell Atl. Tel Cos v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

6 *See, e.g., KMC Telecom Holdings, Inc. v. FCC*, Case No. 01-1255, D.C. Cir. (filed June 5, 2001).

7 *See* Letter from John D. Windhausen, Jr., ALTS, and H. Russell Frisby, Jr., CompTel, to Dorothy Attwood, Chief, Common Carrier Bureau (Mar. 26, 2001) ("March 26, 2001 ALTS/CompTel Letter"). As explained below, should the Commission decide to conform the "growth cap" and "new market bar" in accordance with the March 26, 2001 ALTS/CompTel Letter, the Commission also should issue detailed implementation instructions to prevent the ILECs from taking unilateral action to give effect to any modified Commission rule.

II. THE COMMISSION SHOULD GRANT THE CORETEL PETITION AND STAY THE "GROWTH CAP" AND "NEW MARKET BAR" PENDING JUDICIAL REVIEW

The Joint Commenters submit that the Commission should grant immediately the CoreTel Petition and stay the growth cap and new market bar contained in the Commission's *Order on Remand*. As noted in the CoreTel Petition, although the FCC issued its public notice on June 23, 2000, received voluminous comments, reply comments, and *ex parte* presentations, the growth cap concept was not raised until late March 2001, less than a month before the Commission issued the Order on Remand.[8] As a result, competitors barely had an opportunity to respond to the proposal on the record,[9] never mind modify their business plans in accordance with such restrictions. More egregious, the new markets bar wasn't mentioned on the record at all. Indeed, this critical limit on entering new markets wasn't even mentioned in the Commission's press release; rather, CLECs learned of it only after the *Order on Remand* was publicly released weeks later. CLECs had absolutely no time to react to this eleventh hour restriction.

The Joint Commenters will suffer irreparable harm similar to that outlined in the CoreTel Petition, should the growth cap and new market rules take effect. In the *Order on Reconsideration*, the Commission justified the growth cap and the new market restriction on an assumption that "unlike carriers that are presently serving ISPs under existing interconnection agreements, carriers entering new markets to serve ISPs have not acted in reliance on reciprocal compensation revenues, and thus have no need of a transition during which to make adjustments

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8 *See, e.g.*, CoreTel Petition, p. 3,

9 *See* March 26, 2001 ALTS/CompTel Letter, p.4.

to their prior business plans."[10] This Commission assumption, however, is fundamentally flawed. As noted in the CoreTel Petition, establishing physical interconnection with an ILEC can take up to a year due to ILEC delays. Moreover, prior to requesting interconnection with an ILEC, CLECs often engage in substantial preparatory work, including identifying where to locate facilities, leasing space, procuring equipment, and building out switching centers. Thus, if the growth cap and new market rules take effect, the Joint Commenters, like CoreTel, will experience artificially constrained growth and will be precluded from equitable cost recovery in new markets, even in cases where the Joint Commenters leased space, deployed facilities, and requested interconnection with an ILEC over a year ago.

In addition to being based on a factually flawed assumption, the Commission's growth cap and new market rules are discriminatory and result in the premature implementation of a bill-and-keep regime on certain types of CLEC traffic. As noted in the March 26, 2001 ALTS/CompTel Letter:

> If a growth ceiling were interpreted to prevent the new CLEC from billing any above-ratio minutes (*i.e.*, 110% of zero is zero), the new CLEC and its customers would receive blatantly discriminatory treatment in violation of section 202. Furthermore, no economically-rational ISP end user would take service from a new CLEC that is forced to require its ISP customers to pay all or a portion of the cost of terminating traffic if existing CLECs in the same market do not require such a payment.[11]

Finally, the growth cap and new market rules are particularly bizarre given the Commission's express finding that the record in the proceeding fails to demonstrate "that CLECs and ILECs incur different costs in delivering traffic that would justify different disparate treatment of ISP-

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[10] *Order on Remand*, ¶ 81.

[11] March 26, 2001 ALTS/CompTel Letter, p. 3.

bound traffic and local voice traffic under section 251(b)(5)."[12] How the Commission can justify differing and discriminatory cost recovery mechanisms for traffic that is otherwise identical is questionable at best.

For these reasons, and for those outlined in the CoreTel Petition, the Joint Commenters strongly believe that CoreTel is likely to prevail on the merits of its appeal on this issue. Moreover, CoreTel has demonstrated that issuance of a stay will not cause harm to other parties, and will further the public interest. As such, the Joint Commenters submit that the Commission should grant in its entirety the CoreTel Petition. to stay the growth cap and new market prohibition provisions pending judicial review.

III. IN THE ALTERNATIVE, THE COMMISSION SHOULD TAKE ACTION ON ITS OWN MOTION TO MITIGATE THE HARM CAUSED BY THE "GROWTH CAP" AND "NEW MARKET BAR"

As noted, the Joint Commenters support the CoreTel Petition for Commission stay of the growth cap and new market rules due to the irreparable harm that would result should those rules take effect. In the alternative, however, the Commission could take action short of a stay that would materially mitigate the harm that otherwise would result should the growth cap and new market rules take effect.

As one alternative, the Commission could issue a *sua sponte* order delaying implementation of the new market and growth cap rules for one year, such that the same rules would take effect April 1, 2002 (*i.e.*, initializing the growth cap based on first quarter 2002 traffic volumes annualized). Doing so would result in two benefits. First, a one-year delay would, consistent with the intent of the *Order on Remand*, permit CLECs that have been attempting to obtain interconnection from the ILECs to get into business in areas in which they

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12 *Order on Remand*, ¶ 92.

already have a reliance interest. Second, a one-year postponement would provide the Court of Appeals sufficient time to address on the merits the *Order on Remand.*

As an additional alternative, the Commission could adopt the proposal presented in the March 26, 2001 ALTS/CompTel Letter. In that letter, ALTS/CompTel presented a more tenable transition plan that would permit CLECs to recover an equitable amount of their costs through existing intercarrier compensation mechanisms.[13] Specifically, ALTS/CompTel proposed the following:

- For any CLEC switch that is planned for a new state and which was publicly announced prior to the effective date of the Commission's order (or which is already installed but which lacks a full twelve month history upon the effective date of the Commission's order), the average twelve month history of all the CLEC's existing switches nationwide will be attributed to the new switch in calculating the effect of the growth ceiling in that state.[14]

- In states where a CLEC already operates switches and where plans for a new switch were publicly announced prior to the effective date of the Commission's order (or which is already installed but which lacks a full twelve month history upon the effective date of the Commission's order), the average 12 month history of the CLEC's existing switches in that state will be attributed to the new switch in calculating the effect of the growth ceiling in that state.

- Adoption of a growth ceiling must not permit any ILEC to refuse to pay bills for above-ratio minutes prior to some "true up" date. Any growth ceiling would impose a predetermined limit on the annual amount of above-ratio minutes that could be billed by a CLEC to an ILEC in a single state. Since that ceiling on above-ratio minutes could not change based on any subsequent events, no ILEC is entitled to point to the existence of the ceiling to justify delayed payment of an otherwise correctly calculated bill for above-ratio minutes that, when added to the year-to-date total, do not exceed the applicable growth ceiling.

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[13] March 26, 2001 ALTS/CompTel Letter, p. 4.

[14] Switches acquired by a CLEC in a merger, purchase, or any other fashion would be treated as new for the purpose of the transition plan.

- Similarly, the mere existence of a ratio calculation cannot be used by ILECs to evade timely payment of proper monthly bills. The ratio methodology has been used in New York for well over a year, and CLECs and ILECs there have successfully used various approaches, such as using the results for the most recent available month, to calculate the applicable ratio. Because the ratio calculation has not required deferred payments or "true-ups" in New York, this Commission should make it clear these will not be required - or permitted - in a Federal plan making use of ratios.

- The transition plan should expressly include a waiver process to accommodate special circumstances.

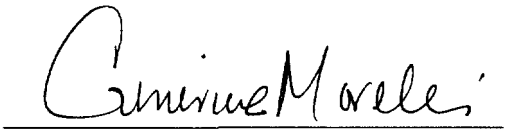
Should the Commission adopt the ALTS/CompTel proposal, however, the Joint Commenters submit that the Commission must also adopt detailed implementation guidelines to ensure that the ILECs are foreclosed from taking unilateral action to (a) disrupt payment of compensation owed or (b) "implement" any such rule outside of the traditional interconnection agreement amendment process.

Through issuing a *sua sponte* order reflecting either of the options outlined in this section, the Commission would materially mitigate the irreparable harm expected should the Commission's growth cap and new market rules take effect. Such a result would substantially lessen the need for a stay of the *Order on Remand.*

IV. CONCLUSION

Consistent with the discussion contained herein, the Commission should grant the CoreTel Petition; or, in the alternative, the Commission should take action on its own motion to mitigate the harm caused by the growth cap and new market bar.

Respectfully submitted,



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